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Letter Ruling 93-1: Taxation of U.S. Judges' Retirement Benefits

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January 6, 1993

You have requested a ruling as to whether Massachusetts requires withholding on the retirement pay of United States judges who, upon retiring from such service, continue to perform judicial duties ("Senior Judges"). Your agency, [the "Agency"], is responsible for this withholding, and so has an interest in the resolution of the question. See 28 U.S.C.A. § 604(a) (West 1968 & Supp. 1992).

In particular, you have proffered two possible justifications for the proposition that the retirement pay of Senior Judges is exempt from Massachusetts tax: (1) the Massachusetts statutory exemption (G.L. c. 62, § 5(b))^[1] for pension trusts which qualify under Internal Revenue Code ("IRC") § 401, and (2) the decisions of the United States Supreme Court in Barker v. Kansas, 112 S.Ct. 1619 (1992), and Davis v. Michigan, 109 S.Ct. 1500 (1989).

FACTS

A Senior Judge is a judge who retires, but elects to retain his or her judicial office and salary. 28 U.S.C. §§ 371(b), 294 (West 1968 & Supp. 1992).^[2] This status permits a Senior Judge to continue to perform such judicial duties as he or she is able and willing to undertake. 28 U.S.C. § 294 (West 1968).

Senior Judges receive the salary of their office at the time of their retirement, plus subsequent cost of living allowances. 28 U.S.C. §§ 371(b), 461 (West Supp. 1992). In addition, Senior Judges who are certified as meeting certain workload requirements receive programmatic salary increases. 28 U.S.C. §§ 371(b) & (f) (West Supp. 1992). You have advised us that, in practice, most Senior Judges receive the workload certification referenced in the preceding sentence.

DISCUSSION

Massachusetts gross income is federal gross income with certain additions and deductions. G.L. c. 62, § 2(a). Federal gross income is income from whatever source derived, including compensation for services, annuities and pensions. IRC § 61(a). There is no exclusion from federal gross income for the retirement pay of Senior Judges, as described in your request for ruling.

Massachusetts withholding is required upon income which is both (1) "wages" as defined in IRC §§ 3401(a) and 3405, and (2) income taxable under G.L. c. 62, G.L. c. 62B, §§ 1 and 2. The term "wages" as defined in IRC §§ 3401(a) and 3405, includes remuneration for services, pensions,

annuities and other deferred income, including amounts paid by the federal government.

I. Exemption For IRC § 401 Plans

Chapter 62, § 5(b) provides, in pertinent part: "[n]otwithstanding any other provision of this chapter, no tax shall be imposed under this chapter upon any stock bonus, pension or profit sharing trust qualifying under section four hundred and one of the [Internal Revenue] Code...." (emphasis added). You have stated that the statutory scheme which contains the provisions cited above in Title 28 of the U.S. Code gives rise to a qualified plan under IRC § 401.^[3] However, even if this is so, nothing in G.L. c. 62, § 5(b), dispenses with an individual's responsibility to pay Massachusetts tax on income received from a qualified plan. Chapter 62, § 5(b), pertains to the taxation of certain trusts, and not the individuals who receive income from those trusts.

II. United States Supreme Court Precedent

A. The Cases: Davis and Barker

Two recent United States Supreme Court decisions invalidated state laws taxing federal retirement benefits that discriminated against federal retirees. Barker v. Kansas, 112 S.Ct. 1619 (1992); Davis v. Michigan, 109 S.Ct. 1500 (1989). Both Barker and Davis involved military retirees, but the analysis is equally applicable to other federal retirees, such as United States judges.

Barker and Davis interpreted the requirements of 4 U.S.C. § 111, which prohibits discrimination against U.S. Government officers and employees "because of the source of the pay or compensation." In Davis the discrimination was manifest: state and local retirees were granted a benefit which federal retirees were not. In Barker the discrimination existed by virtue of the fact that numerous state and local (and certain federal) retirees were singled out individually for benefits to which several groups of federal retirees were not entitled. While the discrimination in Barker was not as obvious as in Davis, there was source discrimination insofar as a tax preference was conferred based upon the provider of the retirement benefits.

Because the tax provisions at issue in both Davis and Barker evidenced source discrimination, they were subject to the applicable test, which is whether "the inconsistent tax treatment is directly related to and justified by significant differences between the two classes." Davis, 109 S.Ct. at 1508; Barker, 112 S.Ct. at 1622. In Davis the Court rejected two justifications proffered by the state of Michigan, including the argument that the disparate treatment was justified by substantial differences in the value of the retirement benefits paid to state and local employees, as compared to federal employees. Davis, 109 S.Ct. at 1508. In Barker the Court rejected Kansas' argument that the disparate treatment was justified because the military benefits in question constituted reduced pay for reduced current services (which services included the possibility of military callback at any time), rather than deferred compensation for past services. Barker, 112 S.Ct. at 1626.

B. Massachusetts Law

General Laws c. 62, § 2(a)(2)(E), provides a deduction from Massachusetts gross income for: "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed." There is no comparable deduction in the Massachusetts General Laws for gross income that is received from such funds which are non contributory or to which an employee has not contributed. The retirement pay received by Senior Judges is not exempt, because Senior Judges do not contribute any monies towards the receipt of their retirement pay.

Because G.L. c. 62, § 2(a)(2)(E), confers a tax preference based, not on the provider of the retirement benefits in question (it is even handed in this respect), but rather, on the nature or existence of the retirement fund, it does not reflect the "source discrimination" that was present in Davis and Barker. Therefore, the test applied in Davis and Barker, that the inconsistent tax treatment must be directly related to and justified by significant differences between the two tax classes, does not apply to G.L. c. 62, § 2(a)(2)(E). See Letter Ruling 89 1, Technical Information Releases 89 6, 92 3. See also Filios v. Commissioner of Revenue, A.T.B. Docket No. 171106

(July 1, 1992).

Moreover, even if G.L. c. 62, § 2(a)(2)(E), is deemed to reflect source discrimination, there are significant differences between the structure of contributory retirement plans and non contributory plans which directly relate to and justify the distinct treatment of distributions from these types of plans. See Technical Information Release 92 3; see also Barker, 112 S.Ct. at 1626, n.5 (where the Court acknowledged, but did not rule on, this justification).

CONCLUSION

Neither G.L. c. 62, § 5(b), nor G.L. c. 62, § 2(a)(2)(E), provide a deduction for retirement pay received by Senior Judges. Therefore, this pay is subject to Massachusetts income tax, and Massachusetts withholding requirements.

Very truly yours,

/s/Mitchell Adams

Mitchell Adams
Commissioner of Revenue

MA:HMP:mtf

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[1] In your ruling request you reference G.L. c. 62, § 3B(b) for this exemption. As there is no such provision, we have treated your reference as being to G.L. c. 62, § 5(b).

[2] This election requires that the Senior Judge has met certain age and service requirements. 28 U.S.C. § 371(b) (West Supp. 1992). Alternatively, a United States judge who meets these requirements can retire and give up his or her judicial office pursuant to 28 U.S.C. § 371(a). Judges who choose this latter option receive an annuity frozen at their salary level at the time of their retirement. You state that most judges choose Senior Judge status under 28 U.S.C. § 371(b), rather than retirement under § 371(a).

[3] See Rev. Rul. 61-218, 1961-2 C.B. 102; accord Rev. Rul. 71-481, 1971-2 C.B. 330.